

NO. PD-1382-18  
TO THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF TEXAS

FILED  
COURT OF CRIMINAL APPEALS  
6/12/2019  
DEANA WILLIAMSON, CLERK

RITO GREGORY LOPEZ, JR.

Appellant

v.

THE STATE OF TEXAS

Appellee

Appeal from Moore County  
Court of Appeals Nos. 07-18-00084-CR through 07-18-00094-CR  
Trial Cause No 5465

**APPELLANT'S BRIEF ON THE MERITS**

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## TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State's use of Tex. Penal Code §22.011(f) is an attempt at an overbroad and absurd use of the statute. The intention of the statute is to punish bigamists rather than to provide the State with a way to enhance any sexual assault beyond what is authorized by the Texas Penal Code. The State's use of Tex. Penal Code §22.011(f) is an attempt at an overbroad and absurd use of the statute. The intention of the statute is to punish bigamists rather than to provide the State with a way to enhance any sexual assault beyond what is authorized by the Texas Penal Code.

## STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant argument.

## STATEMENT OF THE CASE

Appellant was indicted on eleven counts of Sexual Assault of a Purported Spouse Under 14. Appellant was convicted by The Honorable Ron Enns and sentenced to 25 years' incarceration. On appeal, Appellant argued insufficiency of evidence – an appeal Appellant still contends – and insufficiency due to failure to present evidence of actual bigamy. The Court of Appeals reversed and remanded for new sentencing but did not overturn the conviction.

## GROUND FOR REVIEW

Is the State required to prove bigamy under Penal Code §22.011(f) in order to obtain a conviction?

## STATEMENT OF FACTS

Appellant was accused by his then step-daughter of sexual assault. The State enhanced the charge by establishing Appellant was married to the alleged victim's mother. The State did not present any evidence of bigamy at trial, and upon appeal argued that it had proven bigamy solely by presenting evidence of sexual assault. This is insufficient under Texas law to prove bigamy.

The Court of Appeals remanded for new sentencing within the statutory grounds for sexual assault.

## SUMMARY OF THE ARGUMENT

The intent of §22.011(f) was to enhance punishment against bigamist cult leaders who would often purport to marry underage females within the organization. Were the intent to enhance any sexual assault case in which the alleged attacker could not marry the alleged victim the State could have written the statute to state this intent.

By referencing the bigamy statute within §22.011(f), the State's intent for the bigamy statute to be used is clear. At the time of the alleged offense, Appellant did

not claim to be married to his then step-daughter. The Court should follow the intention of the statute, rather than allow the State to enhance any sexual assault.

## ARGUMENT

### Statute at issue

[A]n offense under this section is a felony of the first degree if the victim was a person who the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section §25.01.

### Appellant's Argument

The language of the opinion in *Arteaga*, states that this Court did not find it absurd to conclude that the intent of the statute was to enhance punishment in bigamist situations. *Arteaga v State*, 521 S.W.3d 329, 337 (Tex. Crim. App. 2017). This appears to be in direct opposition to footnote 9 of the opinion. The 9<sup>th</sup> footnote of *Arteaga* has caused issues amongst the lower courts. This had led to differing decisions regarding the enhancement in §22.011(f). *See Senn v State*, 551 S.W.3d 172 (Tex.App. —Fort Worth 2017), *Rodriguez v. State*, \_\_ S.W.3d \_\_, Nos. 01-17-00906-CR through 01-17-00908-CR WL 65318471 (Tex. App. —Houston [1st Dist.] Dec. 4, 2018, Pet. Granted), *Lopez v. State*, 561 S.W.3d 884 (Tex. App. —Amarillo Nov 20, 2018, pet. Granted).

The statute at issue in this case is not written clearly. As such, the intent behind the statute must be understood and used to interpret the meaning of the statute. §22.011(f) was created as an attempt to protect children, most specifically from bigamy and polygamy. *Arteaga* at 337. During Testimony Representative Hilderbran specifically identified The Fundamentalist Church of Jesus Christ of Latter Day Saints' intended move to Texas due to its weak bigamy laws. *Id.* (Citing Tex. H.B. 3006, 79<sup>th</sup> Leg., R.S. (2005)). Were the intent to enhance punishment for sexual assault, the appropriate method for this would be to change the Texas Penal Code to reflect sexual assault as a first-degree felony, rather than attempting to overuse enhancements created for a specific purpose. This Court determined that there were other appropriate charges to obtain first-degree felony punishment in similar sexual assault cases. *Arteaga* at 337. The Bigamy statute, itself, shows that the legislature is able and willing to enhance the punishment based on the age of the victim. Tex. Pen. Code §25.01. The language of §22.011 does not add an enhanced punishment for sexual assault of children.

The statute at issue is ambiguous. In such cases, the Court must interpret what the words within the statute mean. In doing so, the Court should avoid absurd or unjust results. In the case at hand, The State's interpretation of the statute would be both absurd and unjust. It would disregard the first portion of §22.011(f) making sexual assault of a person under the age of 17 a second-degree felony, and it would

enhance the punishment of any person who was married or who was accused of assaulting a married person. The Legislature clearly intended for sexual assault to be a second-degree felony. *Arteaga* at 337 (Citing Tex. H.B. 3006, 79<sup>th</sup> Leg., R.S. (2005). “Absent a clearly expressed legislative intention to the contrary,” the statute’s “language must ordinarily be regarded as conclusive.” *Consumer Product Safety Commission et al. v. GTE Sylvania, Inc. et al.*, 447 U.S. 102 (1980). The language of the statute makes sexual assault of a child a second-degree felony — as indicated by the clear language “[a] felony under this section is a felony of the second degree.” Tex. Pen. Code §22.011(f). The statute need not have directly referenced the bigamy statute if the intent were to merely enhance the punishment range of individuals who could not marry their victims.

The accused in *Rodriguez*, and *Arteaga* were unmarried at the time the assaults took place. See *Arteaga, Rodriguez*. Differing from cases such as *Lopez*, wherein the accused was married at the time of the offense. See *Lopez*. This shows the absurdity of the State’s use of §22.011(f). The men in the *Rodriguez* and *Arteaga* were not legally allowed to marry their victim for varying reasons other than bigamy. Had these men been married, however, then the State’s interpretation would allow the State to enhance their sentence. This does not serve a legitimate purpose under the law. The mere fact that an individual is married, does not allow them greater access to children nor does it necessarily make an offense more, or less, severe.

### Conclusion

This Court's previous ruling was not clear, and thus did not give the courts of appeal appropriate guidance in regards to the purported spouse enhancement. Based on the ambiguous nature of the written statute, the legislative intent, and the probability for absurd results should the State's interpretation be used, this Court should affirm the Court of Appeals opinion and remand Lopez for resentencing as a second-degree felony.

### Prayer

Appellant prays that the Court of Criminal Appeals affirm the Court of Appeal's opinion and remand Lopez for resentencing.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word count tool, this document contains 1,110 words, exclusive of items excepted by TRAP 9.4(i)(1).

/s/ Jerod Pingelton  
Attorney for Appellant

## CERTIFICATE OF SERVICE

The undersigned certifies on this the 11<sup>th</sup> day of May, 2019, Appellant's brief was served on the following:

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